

REMARKS/ARGUMENTS

Favorable reconsideration of this application in light of the following discussion is respectfully requested.

Claims 1-7 are presently pending in this case. Claim 7 is amended by the present amendment. As amended Claim 7 is supported by the original claims, no new matter is added.

In the outstanding Official Action, Claim 7 was rejected under 35 U.S.C. §101; Claims 1, 3, and 5 were rejected under 35 U.S.C. §103(a) as unpatentable over Pietraski et al. (U.S. Patent Application Publication No. 20040187069, hereinafter "Pietraski") in view of Franchi et al. (European Patent Application Publication No. 1 381 180, hereinafter "Franchi"); and Claims 2, 4, and 6 were rejected under 35 U.S.C. §103(a) as unpatentable over Pietraski in view of Franchi and further in view of Alastalo (U.S. Patent No. 6,721,302).

The abstract is amended herewith to place it in conformance with U.S. practice. No new matter is added.

With regard to the rejection of Claim 7 under 35 U.S.C. §101, Claim 7 is amended to recite a computer readable medium, which is an article of manufacture. Accordingly, Claim 7 is in compliance with all requirements under 35 U.S.C. §101.

With regard to the rejection of Claims 1, 3, and 5 as unpatentable over Pietraski in view of Franchi, that rejection is respectfully traversed.

The present application claims priority from Japanese Patent Application No. 2002-365563, filed December 17, 2002. In accordance with 37 C.F.R. §1.55(a)(4), enclosed please find an English translation of the certified copy of this application, along with a statement that the translation of the certified copy is accurate. (A certified copy of this application was previously submitted.) Applicant respectfully submits that the enclosed documents perfect the claim to priority to Japanese Patent Application No. 2002-365563 under 35 U.S.C. §119.

The filing date of Japanese Patent Application No. 2002-365563, December 17, 2002, antedates the filing date of December 2, 2003 of Pietraski, and the filing dates of Provisional Application Nos. 60/494,404, 60/470,921, and 60/444,068 from which Pietraski claims priority. Only Provisional Application No. 60/434,232 predates the perfected priority date of the present application. Therefore, it is respectfully submitted that portions of Pietraski that are not supported under 35 U.S.C. §112, first paragraph by Provisional Application No. 60/434,232 cannot be considered as prior art with respect to the present application under 35 U.S.C. §102. See MPEP §2136.03(III).

In this regard, it is respectfully noted that the portions of Pietraski relied on by the outstanding Office Action, paragraphs 40, 41, and 62, are not included in Provisional Application No. 60/434,232. In fact, it is respectfully submitted that Provisional Application No. 60/434,232 does not mention a base station or a mobile station, much less provide support under 35 U.S.C. §112, first paragraph for “a channel quality detecting unit that detects a channel quality between the base station and the mobile station” or “determining a modulation scheme to be used in the packet communications based on the channel quality and the buffered data amount” as recited in Claim 1. In a similar manner, Provisional Application No. 60/434,232 does not provide support under 35 U.S.C. §112, first paragraph for “detecting a channel quality between the base station and the mobile station” or “a modulation scheme determination unit that determines a modulation scheme for the packet communications based on the channel quality and the buffered data amount in the transmission buffer” as recited in Claim 3, or “a channel quality detecting unit that detects a channel quality between the base station and the mobile station” or “a modulation scheme determination unit that determines a modulation scheme for the packet communications based on the channel quality and the buffered data amount in the transmission buffer” as

recited in Claim 5. Thus, it is respectfully submitted that Claims 1, 3, and 5 (and all claims dependent therefrom) are patentable over the cited references.

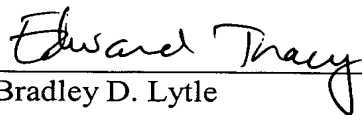
Further, as all the rejections of record rely on the cited portion of Pietraski, it is respectfully submitted that these rejections are traversed as the cited portion of Pietraski may not be applied as a basis for supporting a *prima facie* case of obviousness, as noted above.

Since Applicant has not substantively amended the claims in response to any rejection on the merits, a further rejection of these claims based on newly cited prior art in the next communication **cannot properly be considered a Final Office Action.**

Accordingly, the pending claims are believed to be in condition for formal allowance. An early and favorable action to that effect is respectfully requested.

Respectfully submitted,

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